(2)

No. 91-506

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

ENVIRONMENTAL DEFENSE FUND, INC.
Petitioner,
vs.
WHEELABRATOR TECHNOLOGIES INC. and
WESTCHESTER RESCO COMPANY, L.P.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the District Court judgment that Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA") excludes all waste management activities of qualifying resource recovery facilities, including the generation and disposal of ash, from the hazardous waste regulations of Subtitle C of RCRA?

2. Did the Court of Appeals properly affirm the District Court judgment that a resource recovery facility that otherwise qualifies for the exclusion from hazardous waste regulation set forth in Section 3001(i) of RCRA does not fail to qualify for such exclusion because it is allowed to accept hazardous waste delivered by so-called small quantity generators?

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 29.1, respondents state that Waste Management, Inc., a Delaware corporation, holds a 57 percent interest in respondent Wheelabrator Technologies Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

The petition of Environmental Defense Fund, Inc. ("EDF") raises no issue of general importance for this Court. The United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court for the Southern District of New York for the reasons stated by the District Court in its "thorough and well reasoned" summary judgment opinion.

The opinion below found that ash residue from the Westchester County Resource Recovery Facility (the

"Facility") in Peekskill, New York should not be regulated as a hazardous waste under the Resource Conservation and Recovery Act ("RCRA"). Ash from the Facility will therefore continue to be disposed of in a specially designed and permitted landfill in accordance with the strict regulations of the New York State Department of Environmental Conservation.

Although EDF does not mention it, on November 15, 1990, after the District Court decision in this case, President Bush signed the Clean Air Act Amendments of 1990, which provide, among other things, that ash residue cannot be regulated as a hazardous waste for two years. This two-year moratorium is intended to provide Congress with an opportunity to address the disposal of ash in the context of its expected reauthorization of RCRA. Although Congress indicated that it did not intend the legislation to affect this case and another case on the same issue on appeal from a federal district court in Chicago (which came to precisely the same conclusion as the district and appellate courts in this case), the moratorium assures that the appellate court decision in this case will have no prospective effect. Hence, there is no issue of general importance for this Court to address.

COUNTERSTATEMENT OF THE CASE

Respondents Westchester Resco Company, L.P. and Wheelabrator Technologies Inc. (collectively "Wheelabrator") own and operate the Facility, which is located in Peekskill, New York. The Facility burns municipal solid waste and generates electricity, thereby reducing the volume of waste requiring landfill disposal and helping to reduce dependence on imported oil for the generation of electricity. It is exactly the kind of commercially viable resource recovery facility that Congress stated it

intended to encourage when it enacted Section 3001(i) of RCRA — the provision at issue in this case.

Ash remaining after the combustion process is disposed of at the Sprout Brook ash residue disposal site, a lined landfill with a leachate collection system and groundwater monitoring wells that is operated by the County of Westchester, New York, and is permitted and closely regulated by the New York Department of Environmental Conservation ("DEC"). The State of New York has, through DEC regulations and related interpretations, consistently taken the position that the ash should not be regulated as a hazardous waste, and may be disposed of in this specially designed and permitted landfill.

EDF commenced this litigation on January 27, 1988, alleging that Wheelabrator does not comply with the hazardous waste requirements of Subtitle C of RCRA in handling the ash. EDF simultaneously initiated a similar suit in the Northern District of Illinois against the City of Chicago, which owns and operates a resource recovery facility. *See Environmental Defense Fund, Inc. v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989).

Wheelabrator moved for dismissal or summary judgment on the grounds that Section 3001(i) of RCRA (codified at 42 U.S.C. § 6921(i)), which "clarified" EPA's household waste exclusion, specifically excludes from hazardous waste regulations the ash from a resource recovery facility if the facility complies with the section's requirements.

In a thorough decision rendered on November 21, 1989, the Hon. Charles Haight agreed with Wheelabrator and held that Section 3001(i) of RCRA — the "Clarification of household waste exclusion" — applies to exclude all of the waste management activities of qualifying resource

recovery facilities, including the "generation" of ash, from the hazardous waste regulations of Subtitle C of RCRA. 725 F. Supp. at 764-70; Pet. App. at 31-55.[1] The Court also held that acceptance by the Facility of hazardous waste from so-called "small quantity generators" did not disqualify the Facility from the Section 3001(i) exclusion because small quantity generators are plainly permitted to dispose of their waste at non-hazardous waste disposal facilities such as the Westchester Facility. 725 F. Supp. at 772-73; Pet. App. at 63-66. After limited discovery confirmed that the Facility qualifies for the exclusion offered by Section 3001(i) because it does not accept hazardous waste, EDF stipulated to entry of summary judgment against it.

The judgment of the district court was affirmed by a unanimous panel of the Court of Appeals for the Second Circuit on April 24, 1991, for the reasons stated in "Judge Haight's thorough and well reasoned opinion." 931 F.2d at 213; Pet. App. at 12.[2] On November 29, 1989, the District Court for the Northern District of Illinois issued its decision in *Environmental Defense Fund, Inc. v. City of Chicago,* 727 F. Supp. 419 (N.D. Ill. 1989), in which it also concluded that Section 3001(i) applies to ash from a resource recovery facility.

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[1]Citations to the District Court's opinion are to both the reported opinion and the petitioner's appendix. *See Environmental Defense Fund, Inc. v. Wheelabrator Technologies Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989); Pet. App. 14-78.

[2] Citations to the Court of Appeals opinion are to both the reported opinion and the petitioner's appendix. *See Environmental Defense Fund, Inc. v. Wheelabrator Technologies Inc.*, 931 F.2d 211 (2d Cir. 1991); Pet. App. 1-13.

REASONS FOR DENYING THE WRIT

I.

EDF's Petition Fails to Raise Any Issue Warranting Supreme Court Review.

After the District Court entered judgment, Congress adopted the Clean Air Act Amendments of 1990, which provide, in part, as follows:

> *For a period of 2 years* after the date of enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste *shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act.*

Section 306, Pub. L. No. 101-549, 104 Stat. 2399, 2584 (1990) (codified at 42 U.S.C. § 6921 note) (emphasis added). This two-year moratorium on the regulation of ash as a hazardous waste was adopted to provide Congress with an opportunity to review the regulation of ash in the context of its expected reauthorization of RCRA. *See* 136 Cong. Rec. S16924 (daily ed. October 27, 1990) (statement of Sen. Durenberger).

The House and Senate Conferees explained in a Joint Explanatory Statement of the Committee of Conference that the provision was not intended "to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator Inc.* . . . and *Environmental Defense Fund v. City of Chicago.*" H. Rep. No. 101-952, 101st Cong., 2d Sess. 392 (Oct. 26, 1990) (citations omitted). When the conferees made this statement, the district court below and the district court in Chicago had upheld the applicability of the exclusion to resource recovery facility ash. In any event, it is quite clear that the moratorium eliminates any prospective impact of

EDF's claim that the ash from a resource recovery facility is not covered by the Section 3001(i) exclusion. All regulation of such ash residue is now prohibited for this two-year period, leaving the current practices of the Facility and the facility in Chicago unaffected by any decision in this case.

Indeed, it would be a waste of judicial resources for this Court to review the meaning of Section 3001(i) when Congress itself reexamined that provision last year, and did not see fit to amend it or to overturn the two district court cases interpreting it. Hence, the petition fails to raise "an important question of federal law which has not been, but should be, settled by [the Supreme] Court." Sup. Ct. R. 10.1(c).

II.

The Second Circuit Properly Interpreted Section 3001(i) of RCRA.

The fundamental flaw in EDF's analysis, one that has been recognized by every court that has considered the issue, is that Congress did not enact Section 3001(i) to narrow the scope of the household waste exclusion, but to clarify that the exclusion extended to resource recovery facilities that accept non-hazardous commercial and industrial waste in addition to household waste.

A. The appellate court properly concluded that the Facility's residue ash was exempt from regulation under Section 3001(i).

It is undisputed that the ash produced from the incineration of household waste alone is exempt from regulation as hazardous waste. In 1980, EPA promulgated the so-called "household waste exclusion." *See* 45 Fed. Reg.

33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1)). That regulation defines "household waste" to include "household waste that has been collected, transported, stored, treated, disposed, recovered (*e.g.*, refuse-derived fuel) or reused" and excludes such waste from hazardous waste regulation. *Id.* In its preamble to this regulation, EPA states unequivocally that the entire household waste stream, including the "residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.* at 33,099.

Although EPA's household waste exclusion encompasses facilities that accept only household waste, uncertainty arose as to the status of the typical resource recovery facility: one that accepts municipal solid waste consisting of *both* household waste *and* non-hazardous commercial and industrial waste. Accordingly, Congress enacted Section 3001(i) of RCRA. Pub. L. No. 98-616, § 223(a), 98 Stat. 3221, 3252 (Nov. 8, 1984) (codified at 42 U.S.C. § 6921(i)). The text of that section is set forth in EDF's petition. Pet. at 2-3. The provision, entitled "Clarification of household waste exclusion," provides that a resource recovery facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes" if it receives and burns only household waste and non-hazardous solid waste from commercial or industrial sources, and establishes "contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received." 42 U.S.C. § 6921(i).

EDF contends that while the management and disposal of household waste and non-hazardous commercial and industrial waste by a resource recovery facility is exempt from regulation, the management and disposal of the

resulting ash residue is not. Its entire argument hinges on the absence of the word "generating" from the list of activities referred to in Section 3001(i). The District Court rejected such a narrow reading of the language of the statute, however, finding that the term "otherwise managing hazardous wastes" is sufficiently broad to be considered the type of general catchall provision often found in statutes and that it certainly warranted a review of the legislative history of the section. *See* 725 F. Supp. at 764 & n.13; Pet. App. at 32-34 & n.13.

The District Court then found that the legislative history of the provision leaves no doubt that Congress intended Section 3001(i) to extend to ash. As Judge Haight noted, the Senate Report that accompanied that provision "could not be more explicit." The Senate Report states that "*[a]ll waste management activities* of [a resource recovery] facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion." 725 F. Supp. at 764-65; Pet. App. at 34-36 (quoting S. Rep. No. 284, 98th Cong. 1st Sess. 61 (1983)) (emphasis added by District Court). It thus "includes the term 'generation', that term upon which EDF places so much emphasis." 725 F. Supp. at 765; Pet. App. at 36. The Court also noted that the Conference Committee Report echoes this clear expression of Congressional intent:

> The Senate Amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes . . . .

725 F. Supp. at 765; Pet. App. at 35-36 (quoting H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5649, 5677).

Nowhere in Section 3001(i) itself or in its legislative history is there "any hint of a congressional intent to limit the scope of that earlier [household waste] exclusion." 725 F. Supp. at 765; Pet. App. at 37. The opposite is true. The Senate Report emphasized that

> [i]t is important to encourage commercially viable resource recovery facilities and to remove the impediments that may hinder their development and operation. *New Section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.*

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added). The legislative history of Section 3001(i) is so clear and so directly contrary to EDF's strained interpretation that EDF is forced to characterize it as "loose draftsmanship." Pet. at 11 n.8.

In short, Congress intended to encourage resource recovery facilities by clarifying that the household waste exclusion (which unambiguously included ash) applied to resource recovery facilities that receive both household waste and non-hazardous waste from commercial and industrial sources. There is no indication whatsoever that in "clarifying" the exclusion Congress intended to carve the management of ash out of the exclusion. Such a carveout would be distinctly contrary to the express Congressional intent to encourage the development of such facilities.

EDF relies heavily in its petition on the EPA's initial contrary interpretation of Section 3001(i). *See* Pet. at 11-14. Because that interpretation directly conflicts with the expressed legislative intent, the District Court rejected it.

725 F. Supp. at 766; Pet. App. at 40-41. Moreover, as the District Court detailed, the EPA has since "recognized the questionable basis for its determination that ash is subject to regulation as a hazardous waste." 725 F. Supp. at 767; Pet. App. at 42. "In these circumstances, an additional reason for rejecting the agency interpretation urged upon this Court by EDF is the 'inconsistency of the positions the [EPA] has taken through the years.' " 725 F. Supp. at 768-69; Pet. App. at 49-50 (footnote and citation omitted).

Finally, the appellate and district courts interpret Section 3001(i) in the only manner that gives it significant meaning. EDF concedes that EPA's original household waste exclusion continues to exempt from hazardous waste regulation a resource recovery facility that accepts *only* household waste. Under EDF's construction, Section 3001(i) singles out for more stringent regulation resource recovery facilities that accept non-hazardous commercial and industrial waste in addition to household waste, despite Congress' expressed policy of encouraging the development of such facilities.

B. The appellate court properly concluded that a facility does not jeopardize its Section 3001(i) exclusion by accepting waste from a small quantity generator.

EDF contends that if a resource recovery facility accepts any waste from a small quantity waste generator, it loses its exclusion under Section 3001(i) and must be treated as a hazardous waste facility. Judge Haight emphasized the complete irrationality of this proposition:

> It would make no sense to allow small quantity generators to dispose of their waste in a facility licensed to deal with municipal or industrial waste

> and then to deem that facility a hazardous waste disposal site subject to regulation as such.

725 F. Supp. at 772; Pet. App. at 65.

Moreover, in its original household waste exclusion, EPA expressly noted that waste from a small quantity generator could be mixed with the household waste stream without jeopardizing the household waste exclusion. 45 Fed. Reg. 33,099 (May 19, 1980). Nothing in the history of Section 3001(i) indicates any intention to change this principle.

CONCLUSION

EDF's Petition for a Writ of Certiorari fails to raise any issues worthy of this Court's review. With its enactment of the Clean Air Act Amendments of 1990 and a two-year moratorium on the regulation of residue ash, Congress has rendered academic the issues raised in this case. In any event, the unanimous decisions of the Court of Appeals and the District Court were correct.

Respectfully submitted,

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